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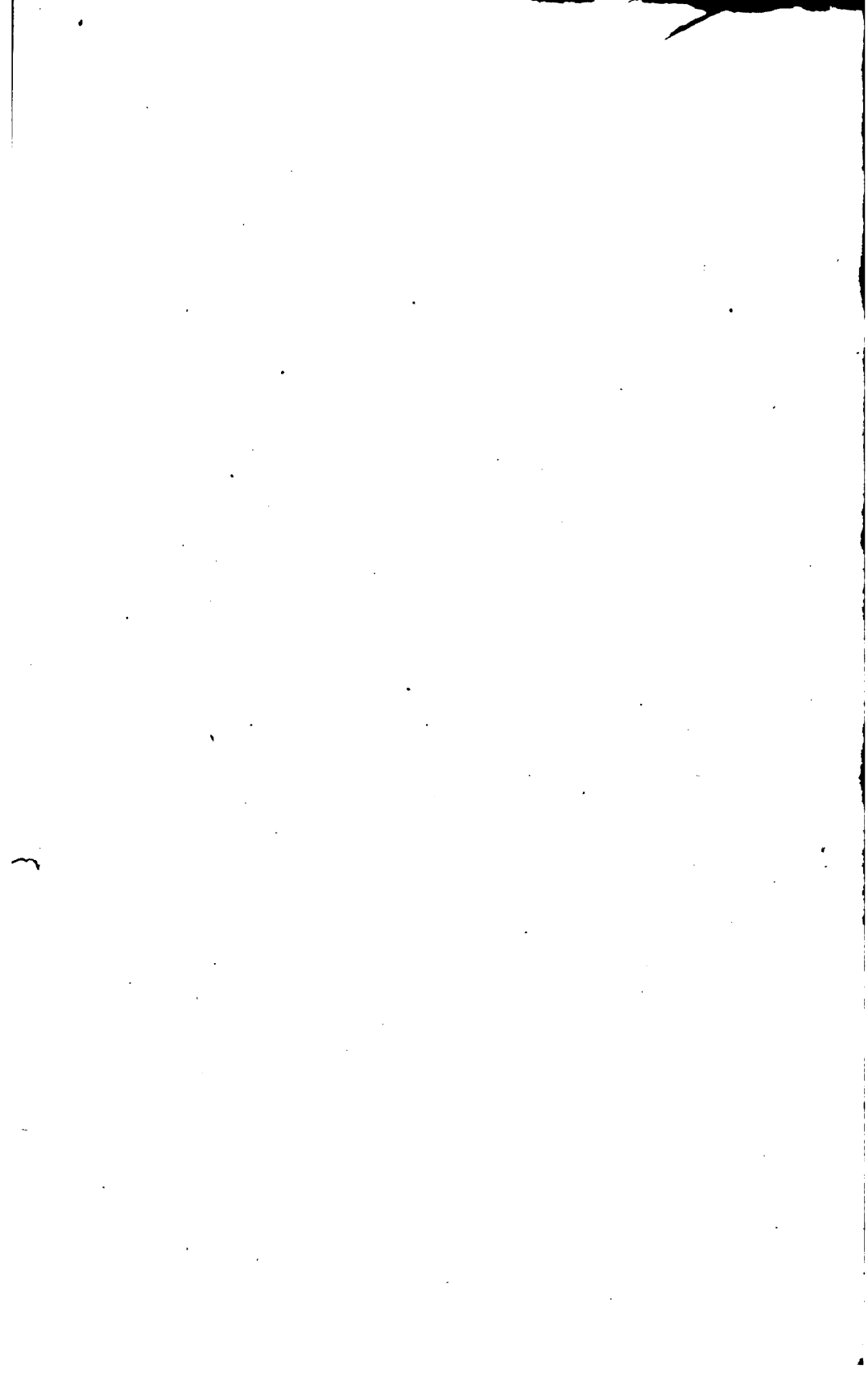
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STUDIES

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IN THE

EARLY HISTORY OF INSTITUTIONS.

BY

Stable

DENMAN W. ROSS.

I.

THE THEORY OF VILLAGE COMMUNITIES.

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THE THEORY OF VILLAGE COMMUNITIES.

THE idea prevails that the earliest form of ownership in land was corporate, collective, or joint ownership; that separate ownership arose in consequence of the disentanglement of individual from collective rights; of the rights of the family from those of the tribe; of the rights of the individual from those of the family. The theory of village communities is based upon this idea. It is now universally accepted.

The theory has arisen in somewhat the following manner. Certain passages of Cæsar's *Commentarii De Bello Gallico* and the twenty-sixth chapter of Tacitus' *Germania* were read. The institution of joint tenure in the land communities of the middle ages was studied. It was then assumed that Cæsar and Tacitus describe joint ownership of land; and the problem arose, how was joint ownership changed to joint tenure. This problem, now of many years' standing, has not been solved. Its conditions, however, are accepted without hesitation or doubt. Men were free in the time of Cæsar and Tacitus, and held land in joint ownership. The same men were unfree in the tenth century and held land in joint tenure. How, therefore, was joint ownership changed to joint tenure?

Then there was a discovery in the East, in India, of free village communities like those of the West among the Germans in Tacitus' time. To be sure the land of the Indian villages is not held in joint ownership, but in ancestral shares. In early times, however, it must have been held in joint ownership; for what was an institution among the Germans in Tacitus' time must have been an institution among their kindred in India. So it has been argued;

and who can deny the force of the argument of evolution as applied to the growth of institutions?

Then there was a discovery in the West. There were village communities in Ireland in early times. They are described in early laws and other records. To be sure the land in these communities was held in ancestral shares. In so far as it was held in ownership at all, it was held in absolute and separate ownership. But what was an institution among the Germans in Tacitus' time, what was an institution not long ago among Aryan peoples in India, must have been an institution among the ancient Irish, their kindred. So it has been argued.

Then was discovered at last the very thing itself, the real village community, the community of Tacitus' Germany, of *pre-present* India, of prehistoric Ireland; a village community in which the land is periodically redistributed among the members, — the Russian *mir*. To be sure all the historians agree that the *mir* is an institution dating from the end of the sixteenth century (1592); that it was in its origin a community of tenants, *adscripti glebæ*, not a community of owners. But is not the argument of evolution as applied to the growth of institutions strong enough to contradict and silence the historians of Russia, the students of a few and doubtful facts? When the general truth has been ascertained, particulars of truths may be disregarded. So it has been argued.

Then followed a general and conclusive consideration. The cultivation and use of land in open fields upon co-operative principles is a fact sufficient in itself to show that land was held in joint ownership in early times; for now in the nineteenth century men are not educated up to the point of understanding and forbearance which is a condition of successful co-operation with absolute property. Can we believe for a moment that the archaic intellect was capable of seeing the advantages and understanding the principles of co-operation which have been discovered and laid down by modern economists with so much wisdom and learning? So it has been argued, and the force of the argument has not been denied.

However, there is that primary assumption that Cæsar and Tacitus describe joint ownership of land: and there are those facts; 1, that the land of the Indian villages is held in ancestral shares; 2, that the land of the ancient Irish communities was held in ances-

tral shares ; 3, that the origin of the Russian *mir* has been placed by competent historians in the sixteenth century of our era. The force and significance of these facts has not been denied, except by the argument of evolution as applied to the growth of institutions ; which argument, in this case, is based upon the above primary assumption that Cæsar and Tacitus describe joint ownership of land.

The following argument is calculated to show : 1, that joint ownership of land was unknown among the Germans in the fifth and following centuries ; 2, that it must have been unknown in the time of Cæsar and Tacitus ; that it is not described by them ; 3, that the law of allodial inheritance, equal division of land among sons, is common to all branches of the Teutonic race ; 4, that it must have been the law of that race before it was separated into branches ; 5, that the law of equal division of land among sons contradicts the theory of village communities with joint ownership of land. The argument will consist of extracts from and references to the original sources, early laws, formulæ, and documents ; interspersed with such brief comment or explanation as seems needed.

The law of allodial inheritance among the Salian Franks.

1. Lex Salica. LIX. 5. De terra vero nulla in muliere hereditas non pertinebit sed ad virilem sexum qui fratres fuerint, tota terra perteneat.

Division among brothers and co-heirs.

2. Formula (Rosière, CXXVI). Pactum divisiones inter fratres, id sunt illi et illi, heredes illui et illei quondam, qualiter se de alote eorum dividere vel exequare deberent, quod ita et fecerunt. . . .

3. Formula (Rosière, CXXV). In Dei nomen. placuit adque convenit inter illus et illus germanus ut inter se de res eorum dividere debuerunt, quod ita et fecerunt. Accipit illi, hoc est casa cum omni circumcincto illa, seu et mancipia, vel mobile et immobile quem in ipsa casa esse viditur, vel vinias, silvas et prata quantumcumque in ipsa casa aspicere viditur, totum et ad integrum. Et in contra accipit germanus suos, illi alio locello illo cum omne rem ad se pertinentis . . . et hec paccio divisionis omni tempore firma permaneat.

4. Formula (Rosière, CXXVII). Dum et divisio vel exsecatio

inter illum et illum seu consortes eorum de alode lui aut de agro illo cælebrare debetur . . .

The inheritance consists of *villas* or portions of *villas*.

5. Formula (Rosière, CCXII). . . . villam juris mei nuncupantem illam, sitam in pago illo, in condita illa, cum terris, ædificiis, accolabus, mancipiis, libertis, viniis, silvis, pratis, pascuis, aquis aquarumve decursibus, mobilibus et immobilibus, cum omnibus appendiciis suisque adiecentiis, sicut a me præsentis tempore videtur esse possessum.

6. Formula (Rosière, CCXIII). . . . portionem meam in villa nuncupante illa in pago illo, quicquid ibidem ad præsens tam de alode parentum vel de qualibet adtractu possidere videor, totum et ad integrum

7. Formula (Rosière, CCIII). . . . porciones meas in loco nuncupantes illo, sitas in pago illo, que mihi tam de alode quam de comparato vel de quacumque libet adtracto advenit vel advenire potest legibus in supra memorata loca, tam terris, domibus, edificiis, mancipiis, libertis, acolabus, merita acolanorum, vineis, silvis, pratis, pascuis, campis, cultis et incultis, aquis aquarumve decursibus, mobilibus et immobilibus, cum omnis adiecentiis et adpendiciis vel colonicis ad se pertinentibus, cum omni integritate vel superposito, quicquid dici aut nominare potest, in supra memoratus pagos vel ubique de supradictas porcionibus tenere visus sum, totum et ad integrum.

These *villas* are manors under allodial lordship, subject to division and subdivision according to the law of allodial inheritance.

8. Lex Salica. XLII. 5. . . . villam alienam.

9. Lex Salica. Capitula VII. 9. . . . villam alterius.

10. Lex Salica. XXVII. 6. . . . orto alieno. . . . 8. . . . campo alieno. . . . 10. . . . prato alieno. . . . 18. . . . silva aliena. . . .

Documents describing allodial property.

11. Guérard. Cartulaire de St. Bertin. III. . . . dono vobis omnem rem portionis hereditatis meæ in pago Toroanense . . . villam proprietatis meæ nuncupante Sidiu, supra fluvium Agniona, cum omni merito suo, vel adjacentiis seu aspicientiis ipsius villæ. Hæc sunt: villa Magnigeleca, Wiciaco, Tatinga villa, Amneio, Masto, Fabricinio, Losantanas, et Ad Fundenis seu Malros, Alciaco, Laudardiaca villa, Franciliaco, cum omni merito

eorum ; cum domibus, ædificiis, terris cultis et incultis ; mansiones cum silvis, pratis, pascuis, aquis aquarumve decursibus. . . . XIV. . . . villas ipsius monasterii quicquid præsentì tempore possidebant, aut adhuc inantea, ex munere regum, vel collato populi [note collato populi]. . . . XVIII. . . . Constat me non imaginario jure, sed plenissima voluntate, vobis vendidisse, et ita vendidi, tradidisse, et ita tradidi, de præsentè, hoc est omnem rem portionis meæ in loco nuncupante Rumliaco, in pago Taruanense, quam de parte filii mei Chardeberti quondam, ex luctuosa hereditate mihi obvenit : id est cum terris, domibus, edificiis, mancipiis, silvis, pratis, pascuis, aquis aquarumve decursibus. . . .

The theory of joint ownership of land is not consistent with the law of allodial inheritance, because joint ownership involves periodic or occasional redistribution, and every redistribution would involve a breach of the law. For example, if two brothers had three sons, the inheritance of one of them would be double that of either of the other two. By redistribution, the larger inheritance would be diminished, and the law of inheritance by which it was acquired would be broken.

If it had been the custom in prehistoric time to redistribute the land of the *villa* once in ten, twenty, or thirty years, or even within the period of a lifetime ; how could the law of allodial inheritance, which we find in the earliest records, have arisen ?

Right of the allodial proprietor to remove himself from his kindred, taking his allodial property with him ; so that his kindred have no further right of inheritance from him nor he from them.

12. Lex Salica. LX. De eum qui se de parentilla tollere vult. 1. In mallo ante thunginum ambulare debet et ibi tres fustis alninus super caput suum frangere debet. Et illos per quattuor partes in malo jactare debet et ibi dicere debet, quod juramento et de hereditatem et totam rationem illorum se tollat. 2. Et sic postea aliquis de suis parentibus aut occidatur aut moriatur, nulla ad eum nec hereditas nec compositio perteneat sed hereditatem ipsius fiscus acquirat.

13. The Laws of Athelstan. 8. . . . If any landless man should become a follower in another shire and again seek his kinsfolk, they may harbor him if they will be responsible for him.

In the Lex Salica it is assumed that he who withdraws from his kinsfolk has land, *hereditas*. But compare

14. Domesday 1. p. 172. . . . si ita liber homo est ut habeat socam suam et sacam et cum terra sua possit ire quo voluerit.

Right of the allodial proprietor to alienate the whole or part of his allodial property to a stranger; *hominem qui ei non perteneat*.

15. Lex Salica XLVI. De hac famirem. 1. Hoc convenit observare ut tunginus aut centenarius malo indicant et scutum in illo mallo habere debent et tres homines [? sacebarones, sacam et socam habentes] tres causas demandare debent. Postea requirent hominem qui ei non perteneat et sic fistucam in laisum jactet. Et ipse in cui laisum fistucam jactavit, de fortuna sua dicat verbum quantum voluerit aut totam fortunam suam cui voluerit dare. Ipse in cujus laisum fistucam jactavit, In casa ipsius manere debet. Et hospites tres vel amplius collegere debet et de facultatem quantum ei creditum est in potestatem suam habere debet. Et postea ipse cui isto creditum est, ista omnia cum testibus collectis agere debet. Postea aut ante rege aut in mallo illi cui fortuna sna deportavit redere debet et accipiat fistucam in mallo ipso. Ante XII. menses quos heredes appellavit in laisum jactet; nec minus, nec majus, nisi quantum ei creditum est.

This is alienation by adoption. Compare

16. Lex Ripuaria. XLVIII. . . . adoptare in hereditatem vel adfatimi per scripturarum seriem seu per traditionem et testibus adhibitis.

We have the *traditio et testibus adhibitis* described in the above passage of Lex Salica (15). In the following formula (17) we have the *traditio per scripturarum seriem*.

17. Formula (Rosière, CXVIII). Si quis in loco filii aliquem adoptare voluerit. . . . Dono igitur tibi omnes res proprietatis meæ quascumque de parte praterna seu de materna adquisisse visus sum, in pago illo, in loco nuncupante illo, hoc est mansos tantos cum ædificiis super positis, curtiferis cum aquarum ausibus, cum terris, silvis, campis, pratis, pascuis, adiacentiis seu et mancipiis ibidem commanentibus. . . .

Right of the allodial proprietor to give land to his vassal or slave. This would be a grant of tenure.

18. Formula (Rosière, CLXI). Quia si aliquis servo suo, gasingo suo, aliquid concedere voluerit. . . . manso illo, infra termino villa nostra illa, cum omni adjacentia ad ipso locello aut mansello aspicientem, terris, domibus, mancipiis, vineis, pratella,

silvola vel reliquis beneficiis ibidem aspicientibus: ita ut ab hoc die ipso jure proprietario, si ita convenit, aut sub reditus terræ, in tua revoces potestate. . . . Compare

19. Edictum Rotharis (Lombard law) CCXXVIII. . . . Nam quantum de rebus benefactoris sui per donum habuerit, si eas non obligaverit, ad ipsum patronum aut heredes revertantur. Et si aliquid in gasindio Ducis, aut privatorum hominum obsequio donum vel munus conquisierit, res ad donatorem revertantur.

In alias vero res [res obligatas] sicut dictum est, si heredes non dereliquerit, aut se vivo non judicaverit, patronus succedat, sicut parenti suo.

The vassal or slave might hold land with right of inheritance and alienation, but it was always a tenure of land, not ownership of it, *jus in re*, not *dominium*. The vassal gave up all rights of ownership, *dominium*, by the act of commendation. The slave lost his with his liberty, or his progenitors lost it.

Acquisition of allodial property by occupation and undisputed possession during one year.

20. Dronke. Codex Diplomaticus Fuldensis. 266. . . . unam capturam cum terris, pratis, campis, silvis, aquis, aquarumue decursibus. . . .

21. Lex Salica. XLV. De migrantibus. 1. Si quis super alterum in villa migrare voluerit, si unus vel aliqui de ipsis qui in villa consistunt, eum suscipere voluerit, si vel unus exteterit qui contradicat migranti ibidem, licentiam non habebit. . . . 3. Si vero quis migraverit et infra XII. menses nullus testatus fuerit, securus sicut et alii vicini maneat.

The right of the *vicini* to prevent the occupation and acquisition of allodial property in the villa by the *migrans* is no indication that the *vicini* held the land of the villa in joint ownership. According to the law of allodial inheritance (equal division of paternal land among sons) neighbors were regularly kinsmen, and might, as such, become heirs one of another. It was in view of this fact that the *vicini* could prevent the stranger from acquiring allodial property in the villa by adverse possession. They could not, however, prevent the adoption of the *migrans* by any one of their number (compare 15, 16, and 17), nor could they prevent the *migrans*, as vassal or slave of one of their number, from receiving a tenure of allodial property in the villa (compare 18 and 19), nor

could they prevent any one of their number from selling some or all of his land to the *migrans* if he chose to do so (compare XVIII under 11).

22. Formula (Rosière, CCLXVIII). Vinditio de villa.

23. Formula (Rosière, CCLXXIV). . . . Constat me, non inmagenario jure nec nullo coagente imperium, sed propria voluntatis mei arbitrio, tibi vendere, quod ita et vendidi tibi, a die præsentis, bunuaria tanta de terra arabili, in loco noncupante illo, quod est in pago illo, quem de parte parentum meorum, tam de alote quam et de comparato, vel de qualibet atracto ad me legibus obvenit; hoc est de uno latius terra illui et de alio latius illui, et de uno vero fronte terræ illui et de alio vero fronte pervio publico. Et accipi a tibi in precio taxato pro hoc, iuxta quod mihi bene conplacuit vel conventum fuit, solidos tantos. . . .

Fancy any one acquiring land by gift or purchase, and finding it next day merged with that of neighboring proprietors for redistribution! We must not forget that joint ownership involves periodic or occasional redistribution.

The opening phrase of the law *de migrantibus* (21) shows that every part of the village domain had its proprietor. What did not belong to one of the *vicini* belonged to another.

The law of allodial inheritance among the Ripuarian Franks.

24. Lex Ripuaria. LVI. 4. Sed cum virilis sexus extiterit, femina in hereditatem aviaticam non succedat.

A woman being under tutelage, in *mundeburde vel defensione*, could only hold a tenure of land *jus in re*. She could not hold *dominium*. With respect to property she stood in the same position as the vassal. He had *jus in re*, no *dominium*. The *hereditas aviatica* refers to *dominium*. Compare Festus; Heres apud antiquos pro domino ponebatur.

The right of allodial inheritance vindicated by battle of two. This indicates *dominium* of course.

25. Lex Ripuaria. LXVII. 5. Si quis pro hereditate vel pro ingenuitate certare cœperit. . . .

Documents describing allodial property.

26. Lacomblet. Niederrheinisches Urkundenbuch. 2. . . . de medietatem ei tradidi hereditatis mee eadem ratione in silva que dicitur *Seewald* siue *Suifertbant*, exceptis agris qui inibi ante extirpati sunt a patribus aut ab hominibus nostris. . . . 3 . . . unum

modicum curtile cum agris III in eadem villa et cum waterscapis, perviis, communiis pascuis [? undivided inheritance], et dedi ei potestatem habere in silva que dicitur *Sitroth* [? undivided inheritance]. . . . 4 . . . terram proprii juris mei . . . id est totam terram illam quam Landulfus litus meus incolebat et proserviebat et unum agrum quem Hildegerus ingenuus homo in meo beneficio ante habuit, cum omnibus que ad ipsam terram respiciunt, id est silvis, pratis, pascuis, perviis, aquis aquarumque decursibus, piscationibus. . . . 5 . . . particulam hereditatis mee, id est, ipsum locum qui dicitur *Ad Crucem* cum pratis, qui ibi jacent in ripa fluvii Arnapi, ubi quondam avus meus Erminfridus casam habebat cum duobus agris qui separati sunt non longe ab eodem loco, dominationemque in silvam que dicitur *Sitroth* [? undivided inheritance. Compare document 3 above] . . . 8 . . . portionem hereditatis mee, id est, omne quod mihi jure hereditario legibus obvenit . . . in terra aratoria seu in pratis et in pascuis et omnem communionem mecum [? undivided inheritance] in silvam que dicitur *Suiftarbant* [compare document 2 above], excepta una particula in illa prata que dicitur *Blidgeringmad*, quam mihi reservavi pro necessitatibus meis. . . . 16 . . . nos coheredes et conparticipes et consanguinei . . . tradidimus agrum hereditarii juris nostri [undivided inheritance]. . . . 17 . . . Idcirco placuit nobis coheredibus et conparticipibus in uno patrimonio . . . tradere . . . aliquam particulam hereditatis nostre. . . . 21 Dum omnibus vicinis suis non habetur incognitum qualiter Hembaldus filius Heribaldi tradidit . . . suam comprehensionem illam quam ipse Hembaldus in propria hereditate in communionem proximorum suorum [this is conclusive] proprio labore et adiutorio amicorum suorum legibus [by right of allodial inheritance] comprehendit et stirpavit. . . . 22 . . . curtile unum et duodecimam partem in silvam [perhaps the donor's grandfather owned the whole and had four sons and the donor had two brothers] qui dicitur *Braclog* cum pascuis et plena dominatione. . . . 29 . . . vendidi proprietatis mee . . . in terra aribili terra et silva quasi jornales VI. et accepi a te pretio. . . . 33 . . . duas partes de illa foreste, . . . quicquid pater noster Amalricus nobis dimisit in hereditatem et in aliis duobus locis terra aratoria . . . unum ante illa porta orientale, alterum prope de ipsa foreste et inter illa dua loca habent jornales X. . . . 34 . . . vendidi res meas proprias . . . jornales

III. et habent de ambos latus terra Frithuric de uno fronte terra Lantbert, de alio fronte vero, terra ipsius emptore. . . . 39 . . . jornale uno de terra in villa nuncupante *Witi* et cum eo medietatem de silva, quicquid mihi in ipsa villa, jure paterno advenit. . . . 61 . . . terram XX. animalium et dimidiam unius [amusing issue of the law of allodial inheritance]. . . . 64 . . . vendidimus, id est comprehensionem nostram in silva que vocatur *Witherowald* quam comprehensionem homines tui una nobis cum circuierunt et novis signis obfirmaverunt et accepimus a te pretium pro ea. . . .

I will refer the reader to the following documents.

27. Beyer. Urkundenbuch der mittelhheinischen Territorien. 6. 8. 13. 14. 19. 25. 30. 32. 39. 41.

28. Hontheim. Historia Trevirensis. XXVII. XXIX. XXXII. XXXV. XXXIX. XLI. XLVII.

29. Codex Laureshamensis. X. XI. XII. XIII. XV. XXXIII. XXXIV.

A few more extracts may be made from—

30. Dronke. Traditiones Fuldenses. Cap. 6. Discriptiones eorum qui de Hassia et Loganahe, Angergowe et Lutringia et Vestfalia, sco. Bonifacio tradiderunt bona sua. 2 quicquid proprietatis habuit in pratis, agris, silvis domibus, familiis et prolibus suis. 21 lidum unum cum omnibus que ad eum spectant et cum LXX jugeribus terre culte . . . 25 . . . unam capturam . . . 33 . . . proprietates suas in Teggenbach, idem partem capture et silvam cum agris, pratis, campis, domibus . . . 38 . . . mansum unum et XL jugera de terra arabili et prata ad XX carradas de feno . . . 58 . . . quicquid in ipsa marca proprietatis habuerunt. 67 . . . unam holzmarcham et prata ad III carradas feni. 81 . . . unam videlicet capturam quam fluvius Felteruccha transmeat. 94 . . . hubam I et areas II et de prato XXX porcorum valens. 104 . . . XII jugera et ambitum unum [compare document 64 under 26] de silva cum agris et pratis. 112 . . . XXX jugera in singulis locis . . . 124 . . . aream in latitudine X virgarum et in longitudine CXXVIII.

It must be remembered that the above alienations of allodial property to St. Boniface were in many, if not in most cases, made by converts to Christianity.

It appears from these documents that the *hereditas aviatica* consisted of *villas* or portions of *villas*. Compare—

31. *Lex Ripuaria. LX.* 1. Si quis villam aut vineam vel quamlibet possessiunculam ab alio comparavit et testamentum accipere non potuerit, si mediocris res est cum sex testibus, et si parva cum tribus, quod si magna cum duodecem ad locum traditionis, cum totidem numero pueris accedat, et sic eis præsentibus pretium tradat et possessionem accipiat et unicuique de parvulis alapas donet et torqueat auriculas, ut ei in post modum testimonium præbeant. . . .

The law of allodial inheritance among the Alamanni.

32. *Lex Alamannorum. LXXXVIII.* Ut fratres post mortem patris eorum hereditatem non dissipent antequam dividant eam.

Documents describing allodial property.

33. *Wartmann. Urkundenbuch der Abtei Sanct Gallen.* 2. 3. 4. 5. 7. 9. 12. 13. 14. 21. 24. 38. 49. 59. 60. 64. 67. 69. 72. 73. 83. 88. 107. 108. 110. 126. 142. 146. 214.

As these Sanct Gallen documents resemble many already quoted, and are rather formal in character, I will give references simply. I will make some extracts, however, from the early and very interesting records of the monastery Weissenburg in Alsace.

34. *Zeuss. Traditiones Wizenburgenses.* I . . . hobas III et mancipia super commanentes . . . homines qui super ipsam terram videntur deservire; hoc est, tam mansis, domibus, edificiis, mancipiis, acolabus, campis, pratis, vineis, silvis, pascuis, aquis aquarumve decursibus, quicquid in ipsa fine visus sum habere . . . IV. . . . silva ibidem mihi aspicientem ad porcos crassare plus minus XV. . . . V. . . . X jornales de terra aratoria et prato ubi potest annis singulis plus minus V carra de feno colligere . . . VII. . . . de terra culturali XX jornales in campum unum juntos et est terminata ab uno latere habet Suaidemundus et ab alio latere habet Ratwino. . . . X. . . . res meas quod in villa Burghaime pater meus Adalbertus condam mihi moriens dereliquit et ego contra germano meo Hebrohardo in porcionem recipi et ad me pervenit, casis, casalibus, terris, pratis, silvis pascuis. . . . XIV. . . . villas [nine of them] . . . de genitore meo . . . XVII. . . . villas juris nostri [four of them] . . . XXI. . . . silva sicut ego ibidem habui . . . XXXVII. . . . quantumcumque genitor meus Raginliodus mihi moriens dereliquit, mea portione, tam terris, mansis, casis, campis, pratis, pascuis, silvis, aquis. . . . LII. . . . hæc omnia sicut jam diximus tam de aviatico, quam de

paterno, sive de materno, sive de comparato, vel de quacumque libet adtractu. . . . LIII . . . excepto illa silva quod ego mea uxore in lib. dote condonavi. . . . LXIX. . . . tres partes de illa marca silvatica, portione videlicet sua. . . . LXXX. . . . midietatem de illa silva. . . . C. . . . omnia quicquid conquirere potui, aut conquestum visus sum habere [acquisition of allodial property by adverse possession]. . . . CIII. . . . quicquid filius meus Radolphus mihi moriens dereliquit, vel quicquid ibidem ad præsens possidere videor, tam de alode parentum vel de qualibet adtractu. . . . CLIX. . . . villas juris nostri . . . una cum basilica ad illas villas aspicientes, cum terris. . . . CLXVII. . . . in Reni fluminis locum ad molinam legitimam, et in eodem loco molinam paratam. . . . CCVIII. . . . jornales XVI, forastum unum et portionem meam de illa harde. . . . CCXXIII. . . . porcione illa in Johannevillare quem nobis de avunculi nostri Cuhnchyryno ligybus obvenit. . . . CCXXX. . . . res meas in pago Faroinse, terra araturia in Cotinea Marca, campo uno; ipse campus de uno latus Froldoldus et sui consorte [? coheredes, participes in patrimonio, compare numbers 16, 17, under 26], de alio latus et de ambas frontus Thudonius tenet. . . . CCXXXVI. . . . hoba una cum casa et scuria et cum terris, pratis, pascuis silvis, aquis aquarumque decursibus, sicut ad ipsa hoba pertinet et tres mensuras supra ad arare. . . .

Dispute between two families about the boundaries of their respective lands.

35. Lex Alamannorum. LXXXIV. Si qua contentio orta fuerit inter duas genealogias de termino terræ eorum, et unus dicit: Hic est noster terminus, alius revadit in alium locum, et dicit: Hic est noster terminus, ibi præsens sit Comes de plebe illa et ponet signum ubi iste voluerit, et ubi ille alius voluerit terminum, et girent ipsam contentionem. Postquam girata fuerit, veniant in medium et præsentem Comitem, tollant de ipsa terra quod Alamanni curffodi dicunt, et ramos de ipsis arboribus infigant in ipsam terram quam tollunt, et illæ genealogiæ quæ contendunt levant illam terram præsentem Comite et commendent in sua manu: ille involvat in fanone et ponat sigillum, et commendet fidei manu usque ad statutum placitum. Tunc spondeant inter se pugnam duorum. Quando parati sunt ad pugnam, tunc ponant ipsam terram in medio et tangant ipsam cum spatibus suis, cum quibus pugnare debent,

et testificentur Deum creatorem ut cuius sit justitia ipsius sit et victoria ; et pugnent. Qualis de ipsis vicerit ipse possideat illam contentionem, et illi allii præsumptiosi quia proprietatem contradixerunt duodecim solidos componant.

This passage has been quoted as evidence of joint ownership of land ; but it must be remembered that, according to the law of alodial inheritance above quoted (32), the land of the family, *genealogia*, would be the sum of the land owned by the members individually. If any of the land of the family was undivided, it was an undivided inheritance, not joint property.

36. Fontes Rerum Austriacarum. XXXI. 20. . . . confinium coheredum. . . .

As undivided inheritance, the *confinium coheredum* was divisible at any time among the *coheredes* ; and the share of each was determined by the number of his father's sons, of his grandfather's sons, of his great-grandfather's sons, and so on back to the sons of the common progenitor. It was necessary simply to make *exæquationes* for each generation, beginning with the first. The enjoyment of undivided lands was in theory at least limited by the relative proportion of individual rights of inheritance and property. Compare

37. Lex Burgundionum. Additamentum Primum. I. 5. Agri quoque communis nullis terminis limitati, exæquationem inter consortes nullo tempore denegandam [between *Frodoldus et sui consorte* (CCXXX under 34). Compare also 4]. 6. Silvarum, montium et pascuorum unicuique pro rata suppetit esse communionem [*pro rata* refers to individual rights of inheritance or property].

38. Mohr. Codex Diplomaticus Cur-Rætiens. 35 (in Wartmann 680). . . . Talem usum habuimus, qualem unus quisque liber homo de sua proprietate juste et legaliter decet habere, in campis, pascuis, silvis lignorumque succissionibus, atque porcorum pastu, pratis, viis, aquis aquarumque decursibus, piscationibus, exitibus et reditibus.

Read the following document, and imagine the undivided land of the two brothers remaining an undivided inheritance among their descendants for six generations.

39. Wartmann. 186. Nos vero in Dei nomine Wago et Chadaloh, filii Perahtoldi. . . . tradimus . . . quedam loca . . . sicut in hodierna die a nobis possessa noscuntur, tam divisa inter nos, quam etiam ea que in commune adhuc habere videmur. . . .

Suppose that the amount of undivided land was one thousand *jurnales*. Devise a genealogical table, and divide and subdivide the thousand *jurnales* according to the law of allodial inheritance. It will be seen that the problem of *exæquatio inter consortes* or *communio pro rata* was a very easy one so long as the knowledge of genealogical relationship was preserved. A mass of evidence might be given to show that such knowledge was valued very highly and preserved very carefully by the Germans in early times. To be sure, appropriations of undivided land were constantly made, *capturæ* or *conquesta* in the documents (compare 25 and 33 under 30, and 2, 21, and 64 under 26, and C under 34). In these cases, if the right of possession was not contradicted by neighbors or kinsmen, *coheredes*, *conparticipes in patrimonio*, it was assumed that no more land had been appropriated than would have been acquired in a general division, *divisio vel exæquatio*. Indeed, it was unlawful to appropriate more than one's due share (share by right of allodial inheritance) of undivided land. Compare

40. Lex Ripuaria. LX. 2. Si quis consortem suum quantumcunque superpriserit, cum quindecim solidis restituat.†

The *consortes* were regularly *coheredes* (compare the formula 4).

The law of allodial inheritance among the Bavarians.

41. Lex Baiuvariorum. XIV. 8. Ut fratres hereditatem patris æqualiter dividant. . . .

Items of allodial property mentioned in the law.

42. Lex Baiuvariorum. I. 1. . . . villas, terram. . . . VIII. 12. . . . hortum alicuius. . . . XI. 3. . . . fines fundorum. . . . terminos alienos. . . . XII. 6. . . . messem vel pratum alterius. . . . XV. 2. Si quis vendiderit possessionem suam alicui, terram cultam, non cultam, prata, vel silvas. . . . XVI. 1. . . . agrum aut pratum vel exartum. . . . XXI. . . . alienum pomarium. . . . aliena nemora. . . . alterius silva. . . .

Concerning boundaries of allodial inheritance and property we must read —

43. Lex Baiuvariorum. XI. 5. Quotiens de commarchanis [note this word] contentio nascitur, ubi evidentia signa non apparent in arboribus, aut in montibus, nec in fluminibus, et iste dicit: Hucusque antecessores mei tenuerunt, et in alodem mihi reliquerunt, et ostendit secundum proprium arbitrium locum;

alter vero nihilominus in istius partem ingreditur, alium ostendit locum, secundum prioris verba, suum et suorum antecessorum semper fuisse usque in præsens asserit. Et si alia probatio nusquam invenire denoscitur, nec utriusque invasionem compensare voluerit, tunc spondeant invicem wehadinc quod dicimus, et in campiones non sorteantur, sed cui Deus fortiam dederit et victoriam ad ipsius partem designata pars, ut quærit, pertineat.

No stronger evidence can be given against joint ownership of land. The *dominium de terra* of the allodial proprietor cannot be more completely established. Compare

44. Lex Baiuvariorum. XVI.

45. Lex Baiuvariorum. XVII.

In both cases, as in 43, we have the right of allodial inheritance and property vindicated by battle of two (compare 25). Or

Documents describing allodial property.

46. Meichelbeck. *Historia Frisingensis*. I. p. 52. . . . rem propriam, quam genitor meus Swarzoth mihi in hereditatem reliquit. . . . casas, cortes, mancipias, servos, liberos, tributales, omnem cultam, incultam, campis, silvis, pratis, aquis, aquarum decurrentibus, mulinos, vineas, greges, jumenta vel quicquid ad ipsum confinium pertinebat . . . I will refer the reader to the *Instrumenta*. IV. V. VII. X. XII. XIII. XVIII. XXVIII. XXIX. XXXV.

47. *Monumenta Boica*. VII. *Monumenta Scheftlarensia*. III. X. XI.

All these documents have the same general character. The quantity of them is very great and their testimony perfectly concurrent.

The law of allodial inheritance among the Angli, Werini, and Thuringians.

48. *Lex Anglorum et Werinorum, hoc est Thuringorum* VI. 1. Hereditatem defuncti filius non filia suscipiat. Si filium non habuit qui defunctus est, ad filiam pecunia et mancipia, terra vero ad proximum paternæ generationis consanguineum pertineat. . . . 8. Usque ad quintam generationem paterna generatio succedat. Post quintam autem, filia ex toto, sive de patris, sive matris parte, in hereditatem succedat, et tunc demum hereditas ad fustum a lancea transeat.

When the inheritance comes at last to the woman, it is no longer associated with the spear. That is to say, it is no longer *dominium*, only *jus in re*. The *dominium* would be held by the man who held the woman in tutelage, *in mundeburde vel defensione*.

Documents describing allodial property among the Thuringians and Werini.

49. Dronke. Traditiones Fuldenses. Cap. 38 and Cap. 5. Compare

50. Jaffé. Monumenta Moguntina. Ex Othloni vita S. Bonifatii. p. 490. Exinde septum carpens iter et Thuringiam paragrans [sanctus Bonifacius, prædicando et baptizando], diligenter investigavit cujus ille locus esset, ubi visio tanta sibi apparuit. Compertoque, quod Hugo, qui dicebatur senior, illius loci possessor esset, petiit ab eo, ut sibi dare dignaretur. At ille, petita annuens, primus omnium Thuringorum hereditatem suam tradidit venerando præsuli. Deinde vero Albolt aliique plures contigua prædicto loco prædia tradiderunt.

In the same way St. Gall, when he found a place for his monastery, discovered that the land he wanted was owned by several persons. They made donation severally. (Compare the Ratperti Casus and Otmari Vita. Monumenta Germaniae. Scriptores. II. pp. 61, 62, 92.)

The law of allodial inheritance among the Saxons.

51. Lex Saxonum. VII. 5. Qui defunctus non filios, sed filias reliquerit, ad eas omnis hereditas pertineat, tutela vero earum, fratri vel proximo paterni generis deputetur.

The *dominium* would lie with the *frater* or *proximus paternæ generis* (compare above 48).

• Vindication of allodial inheritance and property in land by battle of two, *pugna duorum*.

52. Lex Saxonum. XVI. Qui terram suam occupatam ab altero dixerit, adhibitis idoneis testibus, probat eam suam fuisse; si occupator contradixerit, campo dijudicetur.

Documents describing allodial property among the Frisians and Saxons.

53. Dronke. Traditiones Fuldenses. Cap. 41. Descriptiones eorum qui de Saxonia et Fresia sancto Bonifacio sua prædia obtulerunt. 4. . . . XX villulis . . . 16 . . . XXX jugera et unum

lidum nomine Cuteo et silvam sicut alii lidi habere videntur XL jugerum. 29 . . . dimidiam partem capture que est circa fontem qui dicitur Magedobrunno . . . 31 . . . villas IIII. . . . 72 . . . predium meum terram scil. XXIIII boum arandam . . . 113 . . . proprietatem meam in loco Hericgibruhusen et in ceteris villis quicquid mihi amicus meus Gozleib dare commendavit tam in hubis quam in areis, silvis, pratis, domibus, familiis . . . mancipiorum cum prolibus eorum fere centum . . . Cap. 7. Descriptiones eorum qui de Fresia bona sco. Bonifacio tradiderunt. 20 . . . terram XXX duorum pecorum pascualem. Et in alio loco . . . terram XXVIII pecudum pascualem, in tercio loco . . . X pecudum pascua et insuper terram arature sufficientem ad hec, cum mancipiis et cultoribus agrorum XXX numero. 22. . . . quicquid in locis istis hereditatis vel proprietatis habeo . . . XX virgas de terra arabili . . . pascua XIII boum . . . 27 . . . XV boum terram . . . 28 . . . XXX boum terram. 29 . . . terram X boum sicut apud illos mos dicendi est, apud nos vero X jugera [this is interesting].

The law of allodial inheritance is wanting in the *Lex Frisionum*. Compare however Tit. XIX. De parricidiis.

The law of allodial inheritance among the Lombards.

54. Edictum Rotharis CLIII. Omnis parentela usque in septimum geniculum numeretur, ut parens parenti per gradum et parentelam heres succedat. Sic tamen ut ille qui succedere vult, nominatim uniuscuiusque nomina parentum suorum antecessorum dicat. . . .

55. Formula. Petre te appellat Martinus, quod tu tenes sibi malo ordine terram quæ jacet in loco tali. Ipsa terra de qua tu dicis, mea propria est de parte Dominicis parentis mei. Et tibi quid pertinet ad requirendum? De parte ipsius. Tunc interroga ipsum qui tenet, quomodo fuit suus parens. Marcoardus proavus suus fuit, consobrinus de proavo meo, et fuerunt in tertio gradu. Avus meus et avus illius in quarto. Pater meus et pater illius in quinto. Ego et ille in sexto. Interroga similiter illum qui pulsat. Avus meus et avus suus fuerunt fratres et fuerunt secundo gradu. Pater meus et mater sua in tertio. Ego et ille in quinto. Et cum fuerit nominata hæc parentela, interroga eum qui tenet, si potest probare quod plus proximus sit. Si non potest probare, probet ipse qui appellat. Et si ipse non protulerit, juret ipse qui ap-

pelatus est cum suis sacramentalibus, quod plus proximus sit, et habeat ipsam terram.

We have now learned what the law of allodial inheritance was, and we have learned that the inheritance conferred by this law consisted of property in land, *dominium de terra*. We have learned that the law of allodial inheritance was common to the Salian and Ripuarian Franks, the Alamanni, the Bavarians, the Angli, Werini, Thuringians, Saxons, and Lombards, in the earliest period of their recorded history. May we not then infer that it was the law of the Teutonic race before it had separated into branches, that is to say in prehistoric time? But it is said that Cæsar and Tacitus, in their account of the Germans, describe the institution of joint ownership of land which, as we have seen, is not consistent with the law of allodial inheritance. If this is so, we shall have to weigh the testimony of Cæsar and Tacitus against that of all the laws, formulæ, and documents we have been reading; and I am afraid that the testimony of Cæsar and Tacitus would count for very little. But first let us see what they say, — whether, indeed, they do describe the institution of joint ownership of land as is maintained. We will first read

56. Cæsar. De Bello Gallico. VI. 22 . . . magistratus ac principes in annos singulos gentibus cognationibusque hominum, qui una coierunt, quantum, et quo loco visum est, agri attribuunt, atque anno post alio transire cogunt.

57. Cæsar. De Bello Gallico. IV. 1. . . . neque longius anno remanere uno in loco incolendi caussa licet.

58. Horace. Carmina. III. XXIV. 14. Nec cultura placet longior annua [of the Getæ].

So far we have no evidence of joint ownership of land. Reading —

59. Cæsar. De Bello Gallico. VI. 22. . . . neque quisquam agri modum certum aut fines habet proprios [sed privati ac separati agri apud eos nihil est, in IV. 1].

We should say that there was no ownership at all, only adverse possession for a short time by groups of kinsmen. But let us read —

60. Tacitus. Germania. 26. Agri pro numero cultorum ab universis in vices occupantur, quos mox inter se secundum dignationem partiuntur; facilitatem partiendi camporum spatia præbent. Arva per annos mutant et superest ager.

Ab universis in vices is explained in —

61. Cæsar. De Bello Gallico. IV. 1. Hi [Suevi] centum pagos habere dicuntur, ex quibus quotannis singula milia armatorum bellandi caussa ex finibus educunt. Reliqui qui domi manserint, se atque illos alunt. Hi rursus invicem anno post in armis sunt; illi domi remanent. Sic neque agricultura, neque ratio atque usus belli intermittitur.

Compare —

62. Anglo-Saxon Chronicle. A. 894. King Alfred divided his forces, so that one half was constantly at home, the other half in the field.

There is no evidence of joint ownership of land in the phrase *ab universis in vices*. It remains for us to consider the meaning of *agros inter se secundum dignationem partiuntur*. Joint ownership implies equality; a *divisio secundum dignationem* implies inequality. Can we say that there is any evidence here of the institution of joint ownership of land?

It does not seem to me reasonable to base any theory of ownership or tenure of land upon the evidence either of the twenty-sixth chapter of the Germania or the above passages from Cæsar. The most we can infer is: 1, the temporary occupation of tracts of land by groups of kinsmen; 2, division of land among the members of these groups, *secundum dignationem*; 3, adverse possession by the individual of the land thus acquired.

Fortunately, however, we are not left in doubt as to the nature of the *divisio secundum dignationem*. The following passages occur in the law of the Visigoths.

63. Lex Wisigothorum. X. I. 1. Valeat semel facta divisio justa, ut nulla in post modum immutandi admittatur occasio. 2. Divisionem factam inter fratres, etiamsi sine scriptura, inter eos convenerit permanere jubemus; dummodo a testibus idoneis comprobetur et divisio ipsa plenam habeat firmitatem. 3. Si plures fuerint in divisione consortes, quod a multis vel a melioribus juste constitutum est, a paucis vel deterioribus non convenit aliquatenus immutari. . . . 5 . . . Qui placitum divisionis irruperit, et quamlibet partem alienæ portionis invaserit, tantum de suo quantum de alieno occupavit, amittat. . . . 8 . . . Sed quod a parentibus vel vicinis divisum est posteritas immutare non tenet.

Read again 56. The conclusion is inevitable. The *gentibus cognationibusque hominum, qui una coierunt* are the *consortes* and the *parentes vel vicini* of 63, and the territory assigned to them is their allodial inheritance. It is the *confinium coheredum* (compare 36). Compare—

64. Præceptum Bosonis Regis Burgundii. A. 887. (Du Cange, under *Genealogia*). *alodium de nostris genealogiis propriis*.

Reread 37, and in connection with it the following from a document among the records of Freising.

65. Meichelbeck. I. p. 49. . . . *appetivi* [Josephus episcopus] *locum ad proprios heredes, quo vocatur Erichinga, et ibidem pro necessitate domos construxi, quia antea jam temporibus plurimis inculta atque deserta remansit, omnes autem possessores hujus loci prumptis viribus donantes atque tradentes*. . . . *Tasillo Dux Bajoarorum quicquid ad Feringas pertinebat pariter ipsis consentientibus, Alfrid cum fratribus suis et participibus eorum atque consortiis. Reliquas autem partes quicquid ad genealogiam quæ vocatur Fagana* [compare *Lex Baiuvariorum*. II. 20] *pertinebat, tradiderunt ipsi, id sunt: Ragino, Anulo, Wetti et Wurmhart et cuncti participes eorum, donantes*.

The *alodium de genealogia Fagana* would be a family inheritance divided or divisible among all the members according to the law of allodial inheritance. By reference to 54, the reader will see how easy it was at any time to determine the amount of land due to any member of a *genealogia* or *parentela*, by simple reference to the sons of common progenitors and the number of them, making *exæquationes* accordingly (compare remarks under 36).

If any doubt remains in the reader's mind whether *secundum dignationem*, which seems to refer to social rank, can refer to rights of inheritance and property, it will be removed by the following extracts from Anglo-Saxon sources:—

66. Anglo-Saxon Law of Wergilds. 9. If a *ceorl* be enriched so that he has five hides of his own land and any one slay him, let him be paid for with II. M. *thrimsas*. 10. If he be enriched so that he has a coat of mail, a helmet, and a gilded sword, and yet has not that land, he is *sithcund*.

67. Anglo-Saxon Law of Ranks. * 2. If a *ceorl* thrive so that he has fully five hides of his own land, church and kitchen, bell-house

and buhr-gate-seat, and duty in the king's hall, then he is of *thane*-right worthy. 5. And if a *thane* thrive so that he becomes an *eorl*, then is he of *eorl*-right worthy.

68. Historia Eliensis. II. 40. (Gale. Scriptores. XV. I). Habuit enim [Abbas Wlfricus] fratrem Gudmundum vocabulo, qui filiam præpotentis viri in matrimonium conjungi paraverat. Sed quoniam ille quadraginta hidarum terræ dominium minime obtineret, licet nobilis esset, inter proceres tunc numerari non potuit, eum puella repudiavit

The *divisio inter se secundum dignationem* described by Tacitus was the division of an *alodium de genealogia* among the members of a *genealogia* according to their several rights of allodial inheritance or property. The *alodium* was allotted to the *genealogia* (*gentibus cognationibusque hominum qui una coierunt*) *quantum et quo loco visum est* by the *magistratus ac principes*; and thus the law of allodial inheritance was fulfilled.

This brings me to the end of my labor. It has been shown: 1, that joint ownership of land was unknown among the Germans in the fifth and following centuries; 2, that it must have been unknown among them in the time of Cæsar and Tacitus; that it is not described by these writers; 3, that the law of allodial inheritance, equal division of land among sons, is common to all branches of the Teutonic race; 4, that it must have been the law of that race before it was separated into branches; 5, that the law of equal division of land among sons contradicts the theory of village communities with joint ownership of land. The result of further investigation will be given hereafter.

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STUDIES

IN THE

EARLY HISTORY OF INSTITUTIONS.

BY

DENMAN W. ROSS.

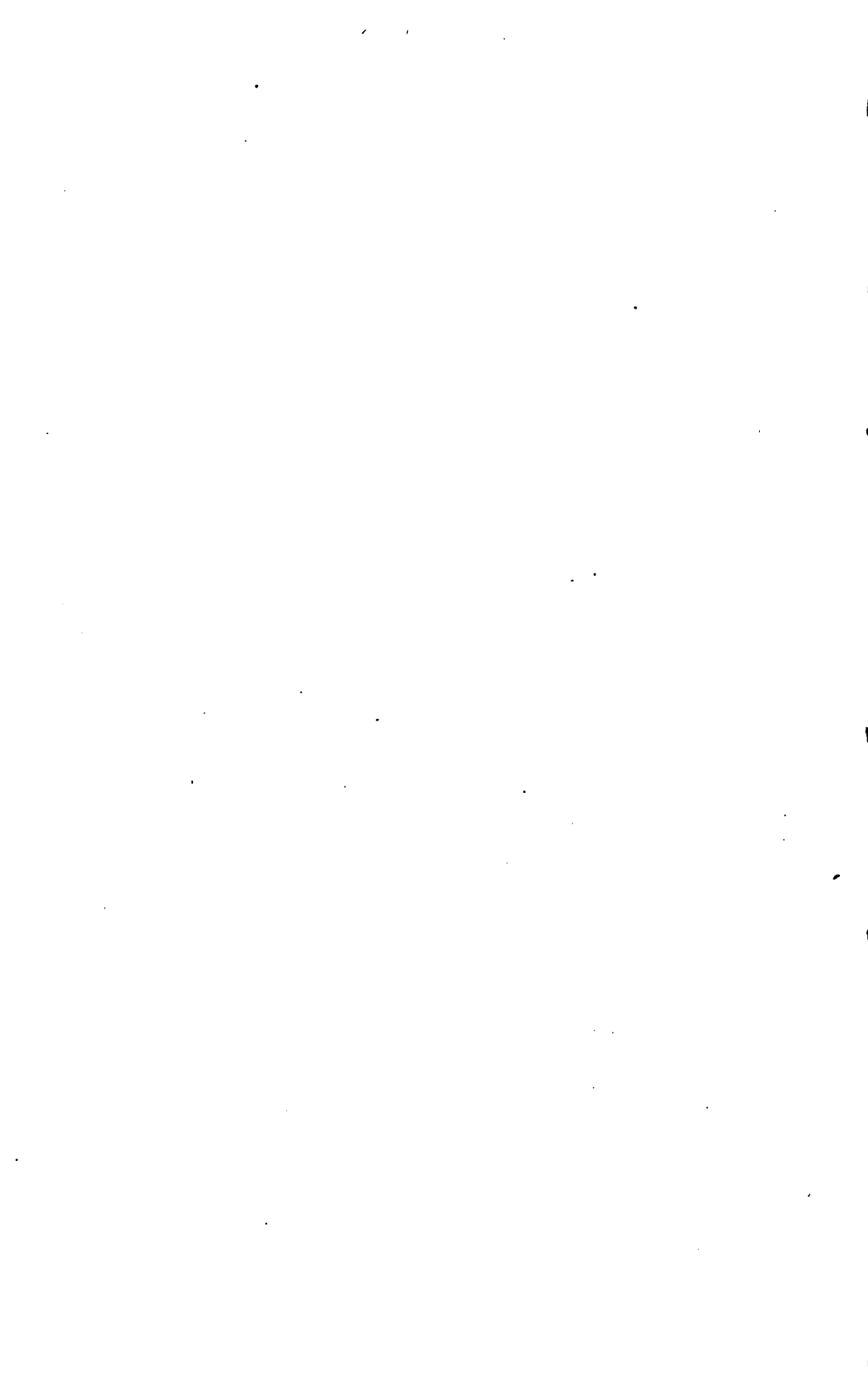
II.

THE THEORY OF VILLAGE COMMUNITIES.

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THE THEORY OF VILLAGE COMMUNITIES.

HAVING shown in the first of this series of studies that the earliest form of possession of land among the Germans was sovereign ownership of the clan distributed among the clansmen *per stirpes*, according to the law of allodial inheritance; the sovereign ownership of the clan consisting of the sovereign ownership of the individual clansmen regarded collectively; I shall now proceed to show that the origin of the land communities of the Middle Ages must be associated with the origin of *adscriptio glebæ* or serfdom.

Instead of believing, as most writers do, that the mediæval land community is identical with the ancient assemblage of allodial proprietors, I am convinced, upon the evidence of the early records, that it is identical with an assemblage of their serfs. It is thought that ancient free communities were suppressed into serfdom during the feudal period, to reappear in modern times, not only living, but little changed in the course of a thousand years. For example, it is said that the copy-holders in England represent to-day the free men of early Teutonic society. I am confident, however, that the English copy-holders appear to-day for the first time as free men; that the manorial community — the community of serfs of which the copy-holders were members during the Middle Ages — cannot be traced to the ancient assemblage of allodial proprietors.

The leading writers admit that the connection between them has never been clearly made out; but they take refuge in reasoning by analogy. At all events, they say, the ancient assemblage of allodial proprietors resembles nothing so much as the group of

serfs in the mediæval manor; so, although the connection between them cannot be made out precisely, their identity is not to be denied.

Reasoning by analogy is seldom conclusive; and surely in this case it is not. Comparing the ancient assemblage of allodial proprietors and the later assemblage of serfs, we shall find that their identity is not at all indisputable, as is maintained. It is true that both groups occupy a definite tract of land, their mark, and both groups are more or less compact and organic; but there analogy stops. In one case the land is held by the group in sovereign ownership, while in the other it is held in servile tenure, amounting to a right of occupation and use on condition of the payment of manifold dues and the performance of base services. The sovereign ownership, in the first case, is distributed *per stirpes*, according to the law of allodial inheritance; in the second case, the land is held by allotment *per capita* from the lord of the manor, and equality, or at least uniformity, is preserved among the allotments. The members of one group are free to go where they please, taking their rights of property with them; but the cultivators in the mediæval manor are *adscripti glebæ*, — serfs bound to the land which they cultivate, with no rights of ownership in it. This comparison of the two groups — the assemblage of allodial proprietors, and the assemblage of serfs in the mediæval manor — could be indefinitely extended, and the catalogue of differences indefinitely lengthened; but it is evident that we are considering different institutions.

The rule for reasoning by analogy is, that if two things resemble one another in many points, they may resemble one another in others, and are perhaps identical. It appears that in the present case we have two things, differing in many points, resembling one another in few. It is no case for reasoning by analogy. If the connection between the group of allodial proprietors and the group of serfs can be made out only by means of this kind of reasoning, it follows that it cannot be made out at all.

But, it will be urged, if the history of the mediæval land communities cannot be traced to the ancient assemblage of allodial proprietors, how are we to explain the sudden appearance of these communities all over western Europe? They are elaborately organized groups of cultivators, governed by a body of

customary rules, which has all the appearance of remote antiquity and very gradual development.

Difficulty follows only on the assumption of sudden appearance. The manorial group may have existed under allodial landlordship as well as under feudal landlordship. There is no reason why its history should not be withdrawn into prehistoric time. It is the purpose of the following argument to show: 1, that assemblages of serfs under allodial landlordship are found among the different branches of the Teutonic race in the fifth and following centuries; 2, that they must have existed in prehistoric time, before the race was separated into branches, — before the time of Tacitus, by whom they are mentioned; 3, that they are identical with the assemblages of serfs under feudal landlordship. The argument, like that of Study I, will consist of extracts from and references to early records, documents chiefly, interspersed with brief comments and explanation.

History must tell her own story. Then I shall undertake a review of the literature of the subject, and a critical examination of the theory of village communities, as presented by the leading writers. This will be in Study III, to appear shortly.

A division of allodial property between two brothers. The property embraces several *villas*, with groups of cultivators in them; land communities.

1. Formula (Rosière CXXII). Igitur placuit atque convenit inter illum et germanum suum illum ut hereditatem paternam atque maternam inter se dividere vel exequare deberent, quod ita et fecerunt. Accepit ille in portione sua villas nuncupantes illas, sitas in pago illo, cum terris, ædificiis, accolabus, mancipiis, vel cetera quæ secuntur. Similiter econtra accepit ille a compensatione portionis suæ villas, nuncupantes illas, sitas in pago illo cum terris, ædificiis, accolabus, mancipiis, vel cetera quæ secuntur.

Description of a *villa* with its group of cultivators, a community under allodial landlordship.

2. Formula (Rosière CXL). . . . villa nostra, quæ sita est in pago Alsacinse quæ dicitur Herinstein [Erstein, eleven miles from Strasburg, on the road to Basle], mansum dominicum cum omnibus suprapositis, et alios mansos tantum LX ad eum pertinentibus, cum mancipiis desuper commanentibus et ad eosdem LX man-

sos aspicientibus. Has res, sicut superius continetur scriptum, cum domibus, ædificiis, mancipiis, terris, pratis, silvis, pascuis, aquis aquarumve decursibus. . . .

The *mansus dominicus* was the house of the lord of the manor; the other *mansi* were occupied by serfs. Attached to each *mansus* was an allotment of arable, meadow, pasture, and forest land, or rights therein. In the following formula we have a description of the *mansus* and the lands thereto appertaining.

3. Formula (Rosière CLXI) manso illo, infra termino villa nostra illa, cum omni adjacentia ad ipso locello aut mansello aspicientem, terris, domibus, mancipiis, viniis, pratella, silvola vel reliquis beneficiis ibidem aspicientibus.

If we conceive of sixty (compare No. 2.) such *mansi* grouped together with their lands round about them, — the arable fields, the meadow land, pasture and forest, — we have in mind the picture of the mediæval land community given by the leading writers. We see a number of families occupying a definite tract of land, the sum of their respective allotments, paying tribute to their landlord and performing services of various kinds. For example

4. Neugart. Codex Diplomaticus. LXXVII. A. 780. casatum unum [same as mansum] cum hoba sua [its allotment of arable land] pro annis singulis census exinde solvat [the tenant], hoc est, XV siclas de cervisa [*Theotunicus potus*, beer], et maltram de chernone [spelt]; et in omni zelga [each of the three fields] jornale unum arare, et III dies assecare [to engage in gathering in the harvest] et III amadere [to mow in the meadow land].

In addition to paying tribute for his allotment the tenant was obliged to perform these services.

5. Document of 1131. (Thudichum, Gau-und Markverfassung p. 170,) ut de mansis ipsis annuatim 190 maldra tritici fratribus referantur; mansis singulis 10 maldra per annum reddentibus.

Here we have an example of the land community of the Middle Ages. It is said that this community is identical with the ancient assemblage of allodial proprietors. I maintain, on the contrary, that such communities are found under allodial as well as under feudal landlordship, upon great allodial as well as upon

great feudal estates. Compare Nos. 1 and 2 for examples; also the following.

6. Codex Laureshamensis CLXXXVI. . . . duas partes de omni alode suo, in mansis, campis, pratis, pascuis, perviis, silvis. . . .

A description of a *mansus* is given in No. 3; but here is another.

7. Codex Laureshameusis. CLXXXII. . . . mansum I et quidquid ad ipsum mansum aspicit, terris, pratis, campis, pascuis, perviis, silvis. . . .

Suppose the *omnis allod* of No. 6 comprised nineteen *mansi*, should we not have under allodial landlordship a community identical with that described in No. 5?

The *mansus*, with its allotment of arable, meadow, pasture, and forest land, is a constituent unit of the mediæval land community; it is an item of allodial property.

The identity of the mediæval land community and the group of allodial proprietors can be proved only by showing that each allodial proprietor had one *mansus* and no more, and an allotment of arable, meadow, pasture, and forest land equal to that of his several neighbours, or proportionate therewith. This cannot be shown, nor can it have been the case; for allodial property was distributed, not *per capita*, but *per stirpes*, according to the law of inheritance, equal division among sons. It was acquired by inheritance, appropriation, gift, purchase, or exchange, and there was neither equality nor community of property among the allodial proprietors. The evidence of all this has been given in Study I. In that study I have presented the ancient mark in one of its aspects, as a definite tract of land occupied by a group of allodial proprietors. In this study the ancient mark appears as a definite tract of land occupied by a group of land communities, each community consisting of an assemblage of families occupying *mansi*, each family holding an allotment of arable, meadow, forest, and pasture land, attached to its *mansus*, each *mansus*, together with its lands, belonging to some allodial proprietor in the mark, the tenant paying tribute and performing services for the support and advantage of his landlord.

The tenant is, as a rule, a serf, *adscriptus glebæ*, and Tacitus describes his condition as follows.

8. Tacitus. Germania 25. Ceteris servis non in nostrum mo-

rem descriptis per familiam ministeriis utuntur; suam quisque sedem, suos penates regit. Frumenti modum dominus aut pecoris aut vestis ut colono injungit et servus hactenus paret.

Tacitus refers to the *cultores* again as follows.

8. Tacitus, *Germania* 26. Agri pro numero cultorum ab universis in vices occupantur.

The allodial proprietors of the land, who, together with their followers and dependents, took turns in going to war and staying at home (Study I. p. 21), decided how much land was required at any time by reference to the number of *cultores*. This being determined, they (the allodial proprietors) proceeded to divide it *inter se secundum dignationem*; that is, *per stirpes*, as described at the end of Study I. Each proprietor then distributed his share, *terra sortis titulo acquisita*, among his *cultores*; and in the group of *cultores*, their *mansi*, and their lands, we have the land community of the early and middle ages.

In the following extracts from early Frankish, Suabian, Bavarian, Saxon, and Anglo-Saxon documents, we have examples of allodial property comprising *mansi*, with allotments of arable, meadow, pasture, and forest land, or rights therein, thereto appertaining.

10. Zeuss. *Traditiones Wizenburgenses*. XX. . . . hoc est quod tradimus in pago Elisacinse in villa qui dicitur Hadana, curtiles duo cum casis et ædificiis, terris, pratis, pascuis, silvis, aquis aquarumve decursibus et quicquid ad ipsis curtiles pertinet, et in ipsa marca visi sumus habere excepto in ipsa marca curtile I. quod habet Uto in manu sua cum terris, jornalibus XX, pratis ad carradas V cum silvis. XXVIII. . . . curtilem I, et jornales XIII, cum pratis, et pascuis, et silvis, et pomario, et quicquid ad ipso curtile pertinet. XXXI. . . . hobam I integram ubi supra Reginharius manet cum ædificiis, terris, campis, pascuis, pratis, aquis XXXVIII. . . . quicquid nobis genitor noster Bodegisilus et avunculus noster Reginfridus morientes dereliquerunt; hoc est mansis, domibus, ædificiis, mancipiis, vel acolabus ibidem commanentibus, campis, pratis, pascuis, silvis, aquis, aquarumque decursibus tam de alode quam de comparatione vel de qualibet contractu nobis legibus obvenit XLI. . . . quicquid ad antecessores meos vel ad me legibus obvenit, una cum mansis, domibus, seu mancipiis his nominibus Libone

cum uxore sua Ascuninde vel acolabus ibidem commanentibus seu campis, pratis, pascuis, viniis, silvis, aquis XCIII. . . . hobas II. et illos servos super ipsam terram commanentes CL. . . . mansum ad commanendum cum campis, pratis, silvis, aquis aquarumve decursibus ad ipso manso aspiciente ad integrum.

11. Wartmann. Urkundenbuch der Abtei Sanct Gallen. 8. . . . de colonis meis Erfoinum cum uxore sua et cum omni apertinentia sua, cum casa et cum terra et cum omnibus suis, et alium servum nomine Waldolfum cum casa, cum terra et cum omnibus ad eum pertinentibus. . . . 7. . . . in villa quæ dicitur Huzinaa homines VIII et terras, et silvas vel alias ajacencias 13. Ecclesia que est in Hunichinwilare et ipsa terra salica, et Theotilo majore cum hopa sua et illa hopa qui Vulvincus habet, et Pazmar cum hopa sua et filius ejus et filia ejus cum filiis suis, et Petto cum hopa sua et Teormar cum hopa sua et filiis ejus et Rekinbardi hopa et Herimot cum hopa sua [quite a little land community.] 47. Dono atque trada in villa quæ dicitur Zarduna servo meo nomen Walcozo cum matre sua et cum alia mancipia tria, cum hoba sua et cum omni peculiari suo ex quibus vestitus est, et in ipsa marca Zardunense campis, silvis, pratis, pascuis, viis, aquis aquarumque decursibus.

12. Meichelbeck. Historia Frisingensis. Instrumenta. CCVI. . . . mansos vestitos VIII et inter mansos sunt LII mancipias, cum omnibus ædificiis, cum terrio cultum et incultum, pratis, pascuis, silvis, totum et integrum tam in jumentis quam in omnibus utensiliis ad eos pertinentibus CCXXXV mediam partem hereditatis meæ in loco Perahah firmiter tradidit, id est servum suum cui nomen Atto cum uxore sua Alphilt et filiam nomine Elanhart cum colonia, sicut sedebat vestita, curtem cum domo, cum ædificiis cum territorio, pratis, pascuis, cum omnibus ad hæc pertinentibus.

13. Monumenta Nideraltacensia. Monumenta Boica. XI. p. 14. In villa Poohhofa et villa Muliheim quod Otilo donavit sunt mansos XXVIII cum omnibus terminis suis. In villa Peringas quod Otilo donavit sunt mansos XXX inter tributales et servos cum omnibus terminis suis. . . . In villa Isarahofa quod Otilo donavit sunt mansus XLII quod Starcolfus petivit a jam dicto Duce cum omni marcha seu silva vel omni termino ad ipsum curtem pertinente.

14. Codex Laureshamensis. CCXIV. hoc est rem meam in pago Rinense in Phungestat VIII mansos et hobas ad ipsos pertinentes, Frumoldishubam et mansum, Eolfeshubam et mansum, Ecchereshubam et mansum, Wdenhubam et mansum, Dietleishubam et mansum, Winimanneshubam et mansum, Frickolueshubam et mansum et tria molina et duo loca ad molina facienda et Germundeshovestatt et quidquid ad ipsas hubas aspicere videtur tam mansis, campis, pratis, pascuis, domibus, ædificiis, pomiferis, silvis, terra culta et inculta, perviis, aquis aquarumve decursibus, omnia et ex omnibus, totum et ad integrum, de jure meo in jus et dominationem sancti N CCCCXCVIII. mansos IIII. et dimidium, vel quidquid ad ipsos mansos legibus aspicere videtur tam mansis, campis, pratis, pascuis, perviis, silvis, aquis DCCCXII. servum I, qui vocatur Wulfwin et mansum I, in quo ipse manet, cum sorte sua, hoc est cum terris, campis, silvis [note the word *sorte*] . . . MMXC. mansum I in pago Spirensi in Udomarsheimer marca, cum terra culta et inculta, quæ ad ipsum mansum pertinet. MMCCCLXXIII. . . . VI hubas in supra dicta marca et quidquid ad ipsas pertinet in mansis, campis, silvis, pratis, aquis MMDCCLX. . . . II sortes in supra dicta marca Suegerheim et quidquid ad ipsas pertinere videtur, in mansis, pratis, silvis, aquis.

15. Dronke. Traditiones Fuldenses. Cap. 3. 12. homines XII cum hubis suis Cap. 6. 21 lidum unum, cum omnibus quæ ad eum spectant et cum LXX jugeribus terræ cultæ, mansum insuper unum cum ædificiis et omnibus compertinentiis suis. Cap. 6. 127. . . . XXX jugera agrorum in pago Hessorum cum omni proprietati et familia ac prole successionis et cum censu illorum Cap. 38. 201 in villa que vocatur Arranleiba capturam unam et holzmarcam ad X hubas. Cap. 41. 16 XXX jugera et unum lidum nomine Cuteo et silvam sicut alii lidi habere videntur XL jugerum [note this particularly]. Cap. 41. 36. . . . hubam unam et unam familiam in villa Cap. 42. 20. . . . XXV jugera et silvaticam marcam ad eadem jugera pertinentem cum familia [this also may be noted].

16. Lacomblet. Niderrheinisches Urkundenbuch. 4. totam terram illam quam Landulphus litus meus incolebat et proserviebat et unum agrum quem Hildeggerus ingenuus homo in

meo beneficio ante habuit cum omnibus que ad ipsam terram respitiunt, id est silvis, pratis, pascuis 7 illam hovam integram Alfgatinghova cum pascuis et perviis et aquarum decursibus et scara [a share] in silva juxta formam hove plene. 48. dimidium mansum cum pratis, pascuis, aquis

17. Kemble. Codex Diplomaticus Œvi Saxonici. XII. centum manentes qui adjacent civitati quæ vocatur Hat Bathu XLVIII. XLV casatos in locis ab incolis infra nominatis. Id est V manentes in loco quo dicitur Gersdune; et ubi rivulus qui vocatur Corsburna oritur XX; et in alio loca juxta eundem rivulum X; et juxta laticem qui vocatur Reodburna X. LXXX. aliquam terræ particulam id est X cassatorum juxta fluvium vocabulo Stur cum omnibus necessariis ad eam pertinentibus cum campis, silvisque cum piscariis pratisque CIII. aliquam terræ portionem quasi XXX manentium habentem nec non et villam cui subjacent, pascua, prata, arida, irrigua, simul et silvestria loca. CV. terram juris nostri decem cassatorum cum campis, silvis, pratis, pascuis, cum omnibus ad se pertinentibus CXVIII. terram illam X tributariorum, scilicet vicum qui Stoke appellatur. CXXVII. Est autem terræ locus celebris, qui dicitur Heanburgh, XX manentium et in provincia Usmerorum, qui nominatur æt Sture XIII cassatos habens. Si quis autem, quod absit, ex parentela mea [note this] vel externorum, malivola mente et maligno spiritu instigatus, cujus donationis nostræ munificentiam infringere nititur et contrarie sciat se in die tremendo coram summo deo rationem redditurum. CXLVII. rura trium tributariorum vocata Eowengelad perdonabo CLXV. tradidi Cuthberhto principi terram X manentium quæ nuncupatur æt Suinesheabde cum pratis et pascuis ac silvis cunctisque ad se pertinentibus. CLXVI. illam terram æt Westbyrig cum omnibus ad se rite pertinentibus id est LX manentium, et in alio loco æt Heanberig XX manentium.

18. Baed Historiæ Ecclesiastici, Lib. I. Cap. XXV. Est autem ad Orientalem Cantix plagam Tanatos insula non modica, id est, magnitudinis juxta consuetudinem estimationis Anglorum familiarum sexcentarum [so in Lib. IV. Cap. XI, and Cap. XIII.]

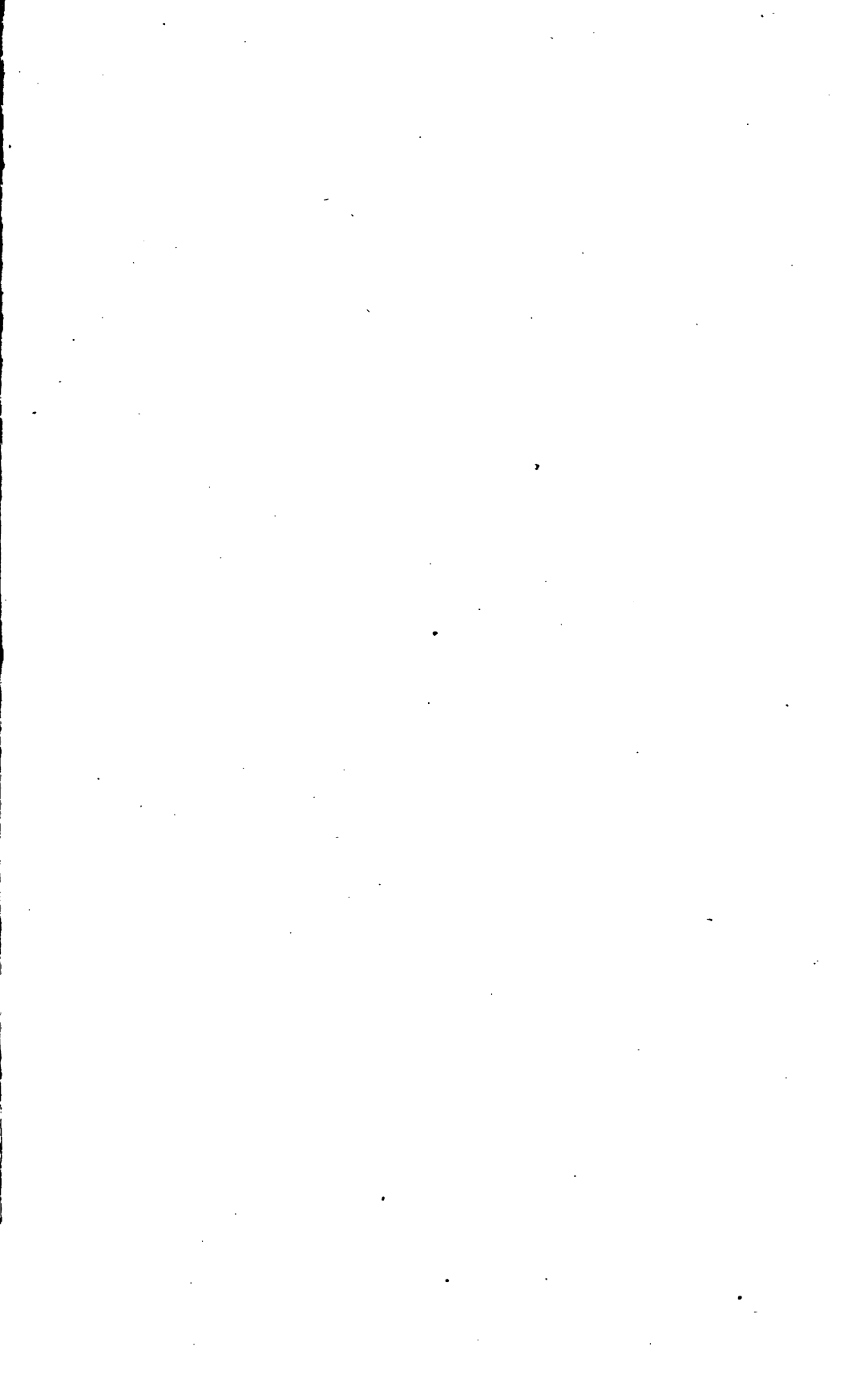
The *familie* of Baed (A. 700) are the *villani* of Domesday (A. 1086), the *consuetudinarii* of St. Peter's at Gloucester (A. 1265), but in Baed's time they are tenants under allodial landlordship.

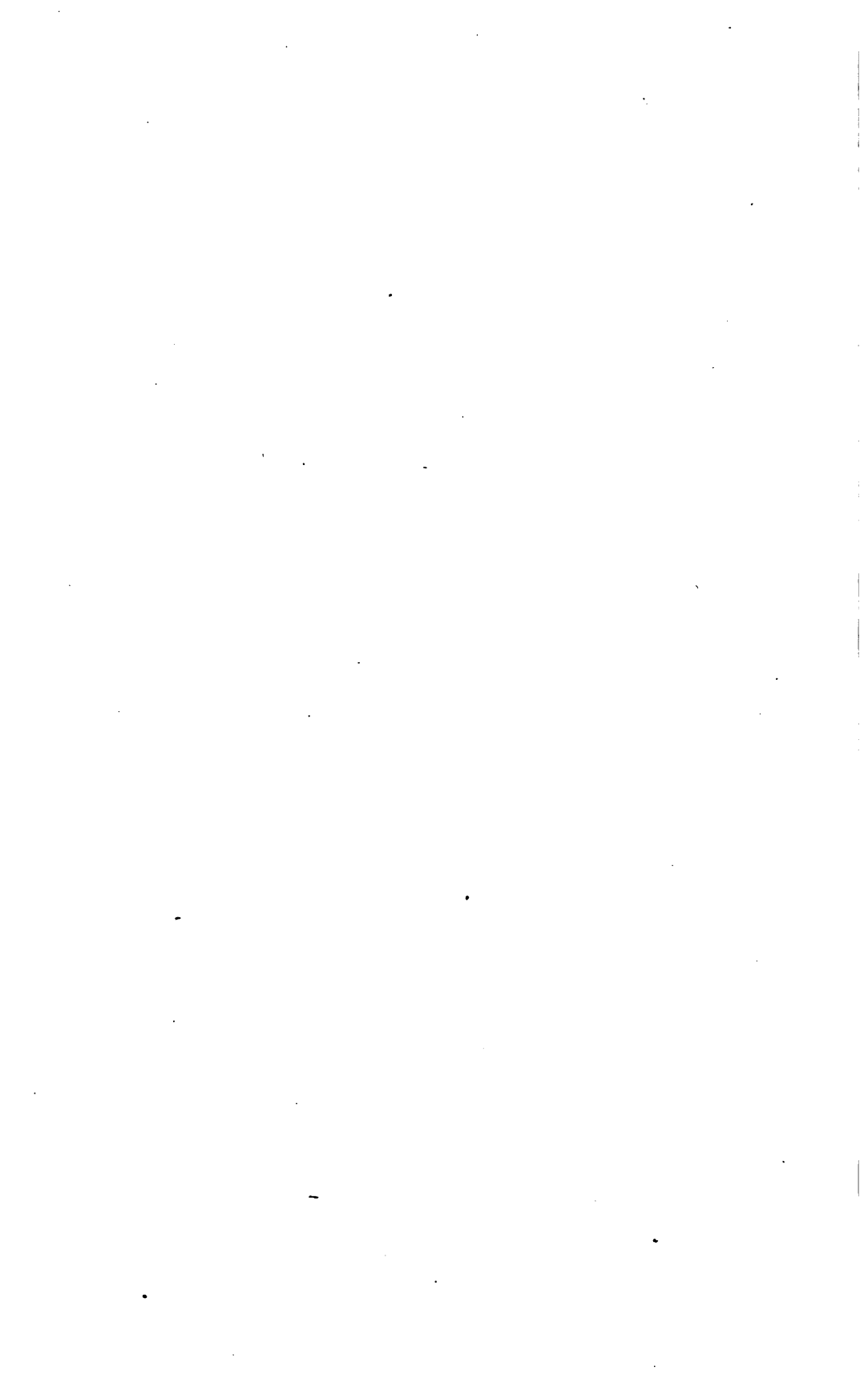
The number of these illustrations could be indefinitely increased and their range extended. In the Codex Laureshamensis alone there are upwards of three thousand Notitiæ Traditionum, alienations of allodial property resembling those given above (No. 14); and many important collections of early documents have not been referred to at all, — those of St. Bertin, Prüm, Trier, Corvey, Salzburg, and others.

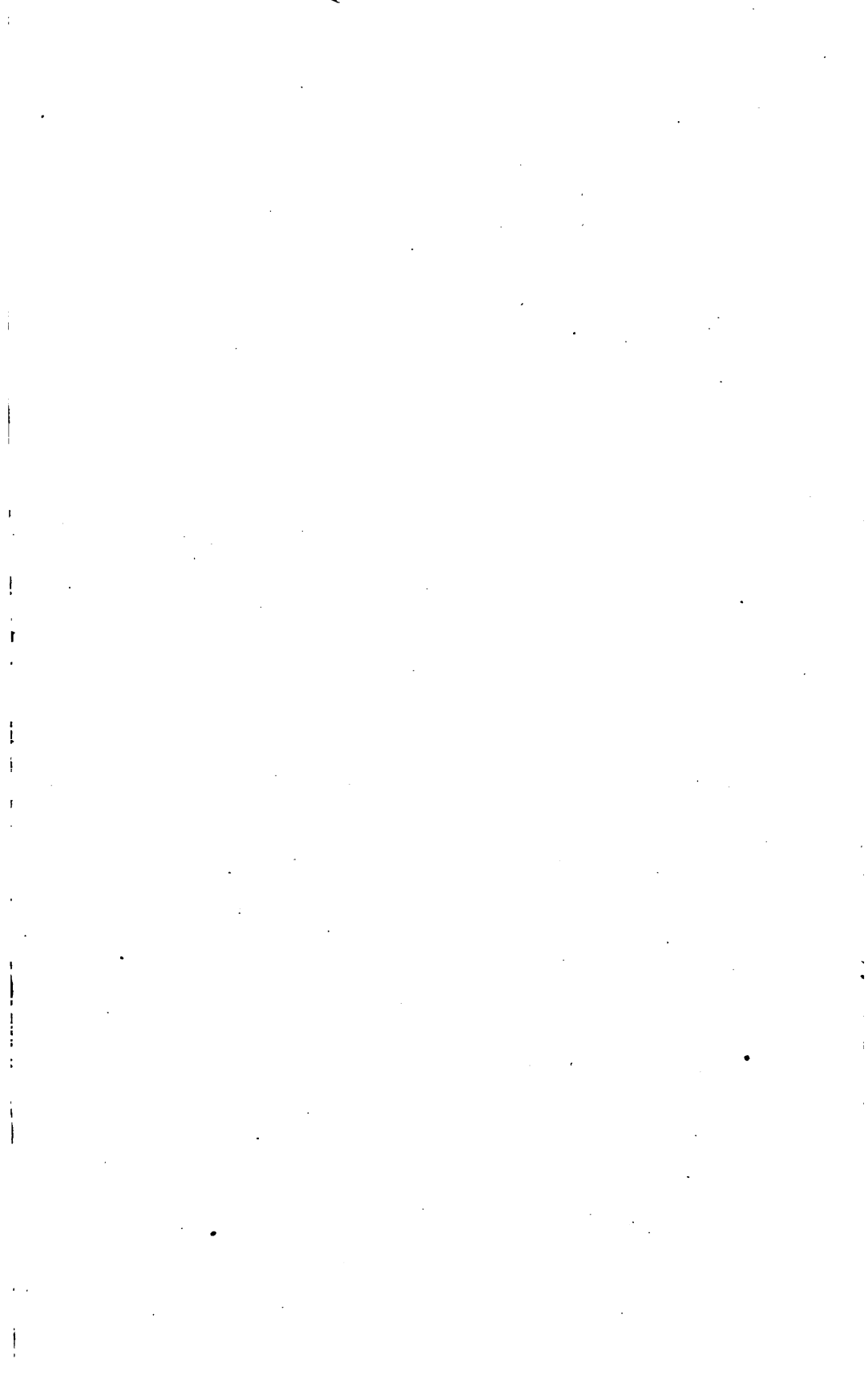
It is said that the early history of ownership and tenure of land among the Germans is a subject upon which so little evidence can be mustered that positive conclusions cannot be reached. This I deny. The evidence seems to me ample and trustworthy, and its testimony perfectly concurrent. If the reader of the literature of the subject is impressed with the poverty and doubtful character of the early records as compared with those of later times, it is because the testimony of these records is not consistent with the prevailing theories, and it has been disregarded except so far as it has lent itself to misconstruction. But this is to be considered in my next study.

Having examined thoughtfully and during several years the evidence represented in this and the preceding study, I am impelled to a conclusion widely different from that of the leading writers. This conclusion may be stated as follows:—

When the Teutonic clansmen took possession of a tract of land they marked off a certain portion (described a *mark*) and divided it *per stirpes*; the share of each clansman being determined by the law of allodial inheritance applied to the genealogy of his descent from the common progenitor. When the mark was thus divided each clansman distributed his share, or a portion of it, among his vassals and slaves, except such as were supported as personal followers. Each received ground for a house and garden, and an allotment of arable, meadow, pasture, and forest land, or rights therein; and in the group of houses and gardens held by the vassals and slaves of the allodial landlord, and in the aggregate of their several allotments, we have the village community of the early and middle ages.









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